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10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 THOMAS R. FREEBURG and
13 SANDRA FREEBURG, husband and
14 wife,

15 No. CV-09-00093-EFS

16 Plaintiffs,

17 vs.
18 NORTHWEST ORTHOPAEDIC
19 SPECIALISTS, P.S.; JONATHAN
20 P. KEEVE, M.D.; DOUGLAS G.
21 NORQUIST, M.D.; TRACY A.
22 BERG, M.D. (f/k/a TRACY A.
23 MAGNUSON);

24 Defendants.

25 PLAINTIFFS' RESPONSE TO
26 DEFENDANT'S MOTION TO
27 STRIKE FOR FAILURE TO
28 TIMELY IDENTIFY EXPERT
29 WITNESSES

30 I. ISSUE

31 Whether a 21-day delay by Plaintiffs' counsel for expert witness reports justifies
32 dismissal of the action under FED. R. CIV. P.37.

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38 PLAINTIFFS' RESPONSE TO DEFENDANTS'
39 MOTION TO STRIKE FOR FAILURE TO
40 TIMELY IDENTIFY WITNESSES- 1

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II. LAW AND APPLICATION

A. The Scheduling Order required Plaintiffs' expert identification and reports by June 1, 2010. Plaintiffs' full compliance with this Scheduling Order and with FED. R. CIV. P. 26(a)(2) occurred 21 days later. Affidavit of Kenneth H. Coleman in Opposition to Defendants' Motion to Strike for Failure to Timely Identify Expert Witnesses, paragraph 7.

B. As to the application of FED. R. CIV. P. 37(c)(1), the 9th Circuit has stated: "Two express exceptions ameliorate the harshness of Rule 37(c)(1): The information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless." *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Outlined below are the reasons why the 21-day delay was substantially justified and also harmless to Defendants.

Substantially Justified. Plaintiffs encountered extenuating circumstances due to both the unavailability of angiography on CD for Plaintiffs' experts and the illness of Plaintiffs' counsel. Affidavit of Kenneth H. Coleman in Opposition to Defendants' Motion to Strike for Failure to Timely Identify Expert Witnesses at paragraphs 3 & 4. Original CDs from the health care institution did not contain the angiogram, which when discovered then necessitated two emergency requests for the angiogram. Therefore, the angiogram was not able to be provided to Plaintiffs' experts until June 9, 2010, which delayed completion of the written reports by Plaintiffs' experts. Id. at paragraph 5.

On June 7, 2010, six days after the disclosure deadline, Plaintiffs did serve on Defendants nearly complete information on each of Plaintiffs' expert witnesses

PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION TO STRIKE FOR FAILURE TO
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1 including the following: (1) Basis, reasons, data considered, qualifications, and
 2 publications; (2) Expected opinions; (3) Reference to exhibits; (4) Compensation; (5)
 3 Available dates for deposition. Fifteen days later, on June 22, 2010, the written
 4 reports with complete disclosures were served on Defendants. Id. at paragraphs 6 &
 5 7.

6 Plaintiffs have two expert witnesses. Dr. Taylor's deposition took place on June
 7 28, 2010, and Dr. Treiman offered dates in June and throughout July for his
 8 deposition. Id. at paragraph 8.

9 Trial was originally set for February 21, 2011. Then, on Defendants' Amended
 10 Notice of Trial Conflict (Ct. Rec. 18) an Amended Scheduling Order (Ct. Rec. 21)
 11 was issued which postponed trial for approximately two months to April 18, 2011.
 12 However, the disclosure deadline for Expert Identification and Reports was not
 13 changed.

14 As a result of the adjusted trial date, trial is over nine months away. Further,
 15 Defendants now have more time (300 days) between the date Plaintiffs' disclosure
 16 occurred (June 22) and the new trial date than existed in the initial Scheduling Order
 17 between the ordered disclosure date (June 1) and the original trial date (265 days).
 18 Therefore, the 21-day delay of Plaintiffs' complete expert witness disclosure is not
 19 prejudicial to Defendants.

20 **III. CONCLUSIONS**

21 A. This case should not be dismissed because full compliance with the
 22 Scheduling Order for expert reports was served on Defendants 21 days following the
 23 ordered deadline and over nine months before trial.

24 B. There were extenuating circumstances contributing to the 21-day delay.

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 26 PLAINTIFFS' RESPONSE TO DEFENDANTS'
 27 MOTION TO STRIKE FOR FAILURE TO
 28 TIMELY IDENTIFY WITNESSES- 3

C. Defendants have not been prejudiced.

DATED this 29th day of June, 2010.

LAW OFFICES OF KENNETH H. COLEMAN, P.S.

By: s/ Kenneth H. Coleman
KENNETH H. COLEMAN
WSBA No. 22526
Attorney for Plaintiffs

PLAINTIFFS' RESPONSE TO DEFENDANTS'
MOTION TO STRIKE FOR FAILURE TO
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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PLAINTIFFS' RESPONSE TO DEFENDANTS'
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